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IN THE

Supreme Court of the United States

October Term, 1962.

No. 820.

ABRAHAM MINKER, also known as Abe Minker,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Abraham Minker, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on December 4, 1962.

OPINIONS BELOW.

The opinions of the district court (*22a-25a, 176a-185a) are reported in 191 F. Supp. 683 and 197 F. Supp. 295, and are reprinted in Appendix B, *infra*, pp. 23-26; 27-37. The opinion of the Court of Appeals for the Third Circuit, printed in Appendix B, *infra*, pp. 38-44, is not yet reported.

* The reference is to the Appendices printed for the use of the court below, nine copies of which are filed with this Court.

JURISDICTION.

The judgment of the Court of Appeals (Appendix C, *infra*, p. 45) was entered on December 4, 1962. A timely petition for rehearing was denied (Appendix C, *infra*, p. 46) on January 16, 1963. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the government may employ the services of a trash collector to secure evidence to be used in a criminal proceeding, without a search warrant and without the consent of the petitioner or the landlord, from a trash receptacle, shared by petitioner with other tenants, on the premises immediately adjacent to the petitioner's apartment.

2. Whether the trial court should have instructed the jury, as requested, that petitioner, who had been indicted for the felony of attempted evasion of excise taxes under 26 U. S. C. (1954) § 7201, might be convicted of the willful failure to file a return, to pay a tax, to keep records or to furnish information, being misdemeanors under 26 U. S. C. (1954) § 7203.

3. Whether the evidence was sufficient to justify the verdict.

4. Whether the petitioner was properly sentenced to consecutive terms of imprisonment and separate fines on the several counts of the indictment, which charged a separate felony, i.e., attempt to evade the excise tax on wagers, for each month an excise tax return was required to be filed under the Internal Revenue regulations, although no returns were filed, and the evidence does not show more than one attempt.

STATUTES INVOLVED.

There are involved Article III, Section 2(3) of, and the Fourth, Fifth and Sixth Amendments to, the Constitution of the United States; 26 U. S. C. Sections 4401, 4403, 4411, 4412, 6001, 6071, 7201 and 7203 (Internal Revenue Code of 1954); 26 Code of Federal Regulations, Sections 44.4403-1, 44.6001-1, 44.6011(a)-1, and 44.6071-1; and Rule 31(c), Federal Rules of Criminal Procedure. They are printed in pertinent part in Appendix A, *infra*, pp. 17-22).

STATEMENT OF THE CASE.

On May 26, 1960, the petitioner and other named defendants were indicted in the United States District Court for the Eastern District of Pennsylvania for attempts to evade the federal excise tax on wagers, in violation of 26 U. S. C. (1954) § 7201, in the months of September, 1959, through March, 1960. Each of the seven counts contained in the indictment (5a-12a) charges that during one specific month the petitioner and other defendants, none of whom is named in every count, conducted a numbers lottery and accepted wagers upon which the excise tax was due, by reason of which they were required to file an excise tax return for such month. The material part of each count charges that petitioner and the named defendants did willfully and knowingly attempt to evade and defeat the said excise tax "* * * by failing to make such excise Tax Return * * * by failing to pay * * * the said excise tax due * * * and by concealing and attempting to conceal from all proper officers of the United States of America the true and correct amount of wagers accepted * * *."

The petitioner moved to dismiss the indictment (13a) and to suppress and return evidence illegally obtained (14a, 16a). The latter motion upon hearing was denied by the Court (Clary, C. J.) prior to trial (21a, 22a). Appendix B, *infra*, pp. 23-26; at the trial, renewed motions were again denied (54a-55a, 173a).

The petitioner was brought to trial with one of the several defendants, John A. Witkowski, also known as John Wittig, who was named only in Counts 1 and 2, dealing with the months of September and October, 1959, respectively.

The theory of the Government, as outlined to the jury in the United States Attorney's opening address (26a) and summation (190a, supplemental Appendix) was that petitioner and Witkowski were engaged in the numbers business and accepted wagers, as a result of which they were obligated to pay the 10% excise tax on gross wagers; that they willfully failed to make any returns and failed to pay any tax, and in doing so they concealed the true and correct amount of the wagers; that the petitioner was the "kingpin or banker" and Witkowski his "partner or trusted lieutenant."

The petitioner and his wife resided in a second floor apartment at 1955 Hampden Boulevard, Reading, Pennsylvania. The building comprising 1955 and 1957 Hampden Boulevard is a unit consisting of four apartments. A large drum provided by the management as a trash receptacle and required to be used by the tenants of the four apartments (45a-46a) was located outside adjacent to the rear door of the unit, in a lattice-work enclosure three and one-half feet high and protected from the public view by a thicket of bushes (48a-50a). See Exhibit D-3. The receptacle was also used by the superintendent's office. The trash from this receptacle was collected three times a week by an independent collector, Damore, who had a contract to do so with the management (45a).

On October 3, 1959, Government agents, with a warrant, conducted a search of the defendant's apartment at 1955 Hampden Boulevard. Nothing was found pertaining to a lottery (83a, 86a-87a).

Thereafter, without a warrant, and without permission or knowledge of the management or petitioner (49a, 66a), revenue agents regularly took the contents of the aforesaid receptacle during the period from November, 1959, through

February, 1961 (61a). This was accomplished through an arrangement with Damore to keep the contents of the receptacle used by petitioner separate from other refuse he collected in his truck and to deliver them to the agents (51a-52a). The agents pieced together items taken from this receptacle, and these were received in evidence over petitioner's objection.

The Government's evidence also showed that on October 3, 1959, simultaneous raids were conducted at premises 728 Lancaster Avenue, Reading, as well as the petitioner's apartment at 1955 Hampden Boulevard, and at various other locations. On March 26, 1960, a raid was conducted on a farmhouse in the outskirts of Reading. Numbers banks were discovered in operation at the Lancaster Avenue address and at the farmhouse, but nothing whatsoever to implicate petitioner and Witkowski was found at any location.

Over objection of petitioner, a revenue agent testified that he participated in sorting and piecing together scraps of paper taken from the trash receptacle used by the petitioner at 1955-57 Hampden Boulevard. Some of the trash referred to as petitioner's was in a bag or box containing items with identifying names (53a). Not all items were in such a bag or box, nor, with respect to the items produced as Exhibits 12A and 12B could the agent say which came from such bag or box and which from loose trash (62a-63a). Exhibits 12A and 12B consist of odd bits of paper on which are miscellaneous handwritten figures and also adding machine tapes all of which were pieced together by the agent. The agent attempted to establish a connection between adding machine tapes pieced together from the trash, the odd bits of paper bearing handwritten figures pieced together from the trash, and records found in the raids on the numbers banks (e.g., 57a-60a, 65a-82a). There were no records recovered at the "bank" in the March raid which tied in specifically with figures on the tapes pieced together from the trash for any prior month involved; nor did the figures on the

handwritten bits of paper tie in with anything found in the numbers bank raid for such months (67a, 70a-81a). Moreover, figures used by the agent in his computation were not necessarily the whole figures found on a piece of paper (e.g., 71a-73a). Some figures he omitted entirely (73a, 75a). When a tape did not fit in with his calculations, he disregarded it (85a). The agent further testified that he threw away pieces of paper with numbers or figures which he thought were irrelevant or did not have a bearing on the matter (84a). Petitioner's objections and motion to strike were overruled (58a, 60a, 118a, 119a).

A handwriting expert in the Government's employ testified that figures appearing on many of the odd bits of paper together from the trash (Exhibits G-16 and G-17, 167a-168a) were in the same handwriting as that of the petitioner, by sample comparison. He also testified that as to some figures on the bits of paper he would not be positive, and as to others he would have no opinion at all. (98a-99a). He further testified that he compared the figures assumed to be written by petitioner with items found at the raids on the numbers banks, and they were not the same handwriting (99a-100a). Objection and motions to strike made by the petitioner were overruled (33a-34a, 92a, 102a, 119a-120a, 122a).

Another revenue agent testified that on March 3, 1960, he asked petitioner whether he was in the business of accepting wagers or had someone working for or on his behalf, to which he did not reply (100a). At that time he advised petitioner of the requirements of the law with respect to persons who accept wagers.

At the conclusion of the evidence, the court granted Witkowski's motion for judgment of acquittal as to Counts 1 and 2, the only counts in which he was named, and also petitioner's motion for judgment of acquittal as to these counts, which related specifically to September and October, 1959 (127a).

The district court rejected petitioner's request for charge on the lesser included offenses under § 7203, I. R. C.

(1954) (158a, 171a, No. 7), and his request for charge that there was no evidence that he had command or control over the lottery operation (170a, No. 4).

Following the jury verdict of guilty against the petitioner as to Counts 3 to 7 (166a), he moved for a new trial and judgment of acquittal (173a, 175a) which motions were denied in a written opinion (Appendix B, *infra*, pp. 27-37). The petitioner was sentenced to consecutive terms of one year imprisonment on Counts 3 to 6; imposition of prison sentence on Count 7 was suspended and petitioner was placed on five years' probation commencing upon release from imprisonment imposed; fines of $2,500, $5,000, $7,500, $10,000, and $10,000, were imposed on Counts 3 to 7, respectively.

The district court held, among other things, that the evidence was sufficient to permit a finding that petitioner was a proprietor of the enterprise. It said that the requested charge on the lesser included offenses would have been given except for the fact that the indictment omitted the word "willful" in alleging the means of committing the offense; therefore, no § 7203 misdemeanor was included in the felony charged.

The Court of Appeals, in affirming the conviction (Appendix B, *infra*, pp. 38-44), held that petitioner had no standing to question the legality of the search and seizure. It further concluded, as a matter of fact, that there was an abandonment of the material in the trash receptacle. It determined that a jury could properly find that the reconstructed pieces of paper were prepared for, and that petitioner was the owner of, the lottery enterprise. It also determined that since evidence of willful failure to file, i.e., destruction of records and clandestine operation of a lottery, was the very evidence tending to prove a willful attempt to evade, the two offenses covered the same ground and a jury would have no basis for finding petitioner innocent of the felony but guilty of the misdemeanor; accordingly, the lesser offense instruction was properly

omitted by the trial court. Finally, the Court of Appeals concluded that the unit of time of the offenses charged was the monthly return, which it said was the basis of the tax; hence, each month of attempted evasion constituted a separate offense. The judgment of the district court was affirmed (Appendix C, *infra*, p. 45).

REASONS FOR GRANTING THE WRIT.

1. The instant case presents questions of singular importance in a vital area touching the constitutional rights of the petitioner—questions of general importance in the administration of the federal criminal laws which have in the past and continue to require the abiding interest of this Court to maintain and effectuate the constitutional guarantees invoked.

The scraps of paper, pieced together from petitioner's trash receptacle and received into evidence over objection, were obtained by federal revenue agents through the device, *previously arranged*, of making the trash collector their agent for the purpose of going upon the premises and seizing the trash receptacle under the guise that he was conducting his ordinary trash collection business. Truly, this was but a variation of an "Oliver Twist method of obtaining evidence." (*Cleary v. Bolger*, — U. S. —, concurring Opinion of Mr. Justice Douglas, 31 L. W. 4102, at p. 4107, decided January 14, 1963). The trash collector was genuinely the alter ego of the revenue agents who requested the precise activity; hence, the situation is no different than if they had personally entered upon the premises and seized the trash receptacle and its contents.

This Court has held that false pretenses, stealth and subterfuge will not avail against the unequivocal requirements of the federal Constitution. *Gouled v. United States*, 255 U. S. 298; see also, *Taglavore v. United States*, 291 F.

2d 262 (C. A. 9); *Fraternal Order of Eagles v. United States* 57 F. 2d 93 (C. A. 3). And in a progression of cases this Court has declared that the eyes of the law cannot be blinded by the cloak assumed by enforcement officers. *Byars v. United States*, 273 U. S. 28; *Gambino v. United States*, 275 U. S. 310, 314, 316; *cf. Elkins v. United States*, 364 U. S. 206; *Mapp v. Ohio*, 367 U. S. 643.

The holding of the court below that petitioner lacked standing to assert this basic right flies in the face of principles settled by this Court. *Jones v. United States*, 362 U. S. 257; *United States v. Jeffers*, 342 U. S. 48. The decision below in this respect conjoins the facts that petitioner shared the trash receptacle with three other tenants and that the receptacle was located outside the building unit. Since the government did not rely upon consent by any person who used or had authority over the trash receptacle, plainly the fact that the use was shared among four tenants of the apartment unit cannot dilute the petitioner's constitutional rights. See *United States v. Lumia*, 36 F. Supp. 552. To hold to the contrary, as did the court below, represents an innovation in this area of the constitutional law of substantial significance and at variance with the principles expounded and applied by this Court particularly in recent years. Moreover, since the evidence, without contradiction, establishes that the receptacle was immediately adjacent to the rear door of the apartment unit, separated and enclosed from the open terrace beyond and from public access and was an integral part of domestic use, the decision below presents a restricted concept of curtilage contrary to the cases to date. See *Care v. United States*, 231 F. 2d 22 (C. A. 10), cert. denied, 351 U. S. 932; 25 C. J. S., Curtilage, p. 65. Such a debilitating application strikes at the very heart of the constitutional guarantee.

The court below also predicated its conclusion on abandonment, which it treated as a factual finding of the district court. However, the district court, at preliminary hearing, made its determination of abandonment as a mat-

fer of law, an important part of which was its own conclusion that the trash collector was not an agent of the revenue officers but merely the finder of incriminating evidence doing his duty by turning it over to the proper authorities. In *Abel v. United States*, 362 U. S. 217, this Court was careful to note that the search of the trash basket was accomplished with the consent of the hotel management after Abel had checked out of the hotel room. In the instant case, no consent was obtained from any person and the trash receptacle was on the premises within the control of the petitioner and others entitled to its use at all times when the searches and seizures were effected. The cases in the courts of appeals, consistently with *Abel* and inconsistently with the decision below, have uniformly refused to receive evidence so obtained. *Cf. Work v. United States*, 243 F. 2d 660 (C. A. D. C.); *Polk v. United States*, 291 F. 2d 230 (C. A. 9); *United States v. Merritt*, 293 F. 2d 742 (C. A. 3).

2. This case raises important questions concerning the distinction between and relationship of major and lesser internal revenue offenses and squarely presents the application of Rule 31(c), Federal Rules of Criminal Procedure (Appendix A, *infra*, p. 22) thereto.

The district court refused a requested instruction which would have permitted the jury to convict the petitioner of a misdemeanor embraced by Section 7203 of the Internal Revenue Code of 1954 (Appendix A, *infra*, p. 19) if it found that he willfully failed to file a return or to pay a required tax. The theory of the request was that a violation of Section 7203 was necessarily included in the violation of Section 7201 (Appendix A, *infra*, p. 19) alleged in the indictment. The Court of Appeals concluded that since in its view the only evidence of a willful failure to file, i.e., the destruction of the records and the clandestine operation of the lottery, was the very evidence tending to prove a willful attempt to evade, the jury would have had

no basis for finding petitioner innocent of the felony but guilty of the misdemeanor. Accordingly, it said, the two offenses covered the same ground: for this it relied on *Berra v. United States*, 351 U. S. 131.

Petitioner submits that the court below manifestly misapplied *Berra*, and at the same time emasculated Rule 31(c) of the Federal Criminal Rules and the settled law which the rule represents. Indeed, its decision conflicts with such relatively recent decisions as *Hansborough v. United States*, 308 F. 2d 645, 647-648 (C. A. D. C.); *Larson v. United States*, 296 F. 2d 80 (C. A. 10); and *Simpson v. United States*, 195 F. 2d 721 (C. A. 9).

In *Berra*, this Court subscribed to the principles of *Spies v. United States*, 317 U. S. 492, concerning the gradation of offenses in the internal revenue code, and expressly subscribed to the lesser included offense rule, to entitle a defendant to have the jury instructed upon the lesser included offenses. 351 U. S., at pp. 133-134. This, indeed, has been the law. *Stevenson v. United States*, 162 U. S. 313. It is a necessary concomitant of Rule 31(c).

However, in *Berra*, this Court did not find a case for the application of the lesser included offense rule. In the circumstances of the case, it determined, proof of identical facts was involved whether the felony statute [§ 145(b), I. R. C. 1939] or the misdemeanor statute [§ 3616(a), I. R. C. 1939] was deemed to govern the prosecution, since both statutes covered the same acts. Thus, in that case, the jury function was exhausted upon determination of the facts, and the other questions resulting from overlapping of the statutes were questions of law. In short, the only issue on the facts was the applicable statute, and this was not a jury question.

In the instant case, the indictment expressly charged that the felony was accomplished by means which, when willful, are directly within the misdemeanor statute. It is quite obvious that the requisite gradation of offenses exists in this case. Assuming that the Court of Appeals was correct

(and it was not) in its statement that the *only* evidence of willful failure to file the required return was the destruction of records and the clandestine operation of the lottery, and that such was the very evidence tending to prove the felony, it is a non-sequitur to say that the jury would have no basis for finding the petitioner innocent of the felony but guilty of the misdemeanor. The jury function remained to determine the motive or purpose to evade requisite to the felony. *Spies v. United States*, *supra*, 317 U. S., at pp. 499-500; *James v. United States*, 366 U. S. 213. It was for the jury alone to determine whether it would draw the inferences necessary to raise the misdemeanors to a felony. The Court of Appeals effectively resolved this factual issue itself and deprived the petitioner of his right to have the issue presented to and acted upon by the jury.

In this case, this Court is squarely presented with a clear cut issue directly involving the application of Rule 31(c) in the context of the gradation of offenses in the internal revenue code. It is submitted that the resolution of the issue by the court below departs from traditional application of the lesser offense rule and conflicts with this Court's decisions in *Spies* and *Berra*, as well as the cases decided in other circuits. Moreover, the issue is one which frequently arises in the administration of the internal revenue criminal provisions and requires the attention of this Court in the interest of sound administration of those laws.

3. The instant case further presents questions of general significance in assessing the evidence necessary to establish the duty of one in the position of petitioner to pay the excise tax.

The indictment herein charged that petitioner conducted a numbers lottery and accepted wagers. Concededly, there is no evidence in the case that petitioner accepted a wager. It is provided by Section 4401(c), I. R. C. 1954 (Appendix A, *infra*, p. 17) that each person who conducts any wagering lottery shall be liable to return and pay the

excise tax on gross wagers. In *Ingram v. United States*, 360 U. S. 672, this Court indicated that a proprietary interest in the lottery enterprise was contemplated by the statute.

The only evidence to involve the petitioner herein received at the trial consists of the reconstructed adding machine tapes and odd bits of paper taken from the trash receptacle. The papers are not records required to be kept. 26 C. F. R. §§ 44.4403, 44.6001-1 (Appendix A, *infra*, pp. 19-21). Nothing indicates that the petitioner had possession or control of these items or what his relationship to them was. The Court of Appeals sustained the verdict on the summary statement that the figures representing amounts were computed for the owner of the enterprise and that petitioner was the owner. But even assuming, *arguendo*, that the handwriting on the odd bits of paper represented amounts computed for the owner, nothing indicates or affords an inference as to petitioner's function with respect thereto. Indeed, the inferences are at least as available that his function was other than that which would charge him with liability to return and pay the tax.

The burden of the Government was to establish not merely that petitioner had something to do with a lottery, but that he conducted the lottery, as alleged in the indictment, i.e., had a proprietary interest therein. It is submitted that on the evidence the function or connection of petitioner with the lottery is purely speculative and conjectural.

4. The instant case further raises a question of general importance in the administration of the penal provisions of the internal revenue code as to which there are conflicting procedures in the lower federal courts.

The indictment charges seven separate felonies distinguished only by the successive calendar month for which it is alleged that an excise tax return was required to have been filed. Upon conviction on five of the seven counts, petitioner was sentenced to consecutive imprisonment sen-

tences and fines on each of the five counts, albeit the evidence showed that no returns were filed and at best could indicate only a single attempt. The Court of Appeals justified the multiple penalties on the ground that excise tax returns are required to be filed monthly, and that since this is the unit of time which is the basis of the tax, just as a year is the period for which income taxes are due, each month of attempted evasion constitutes a separate offense.

A case which in principle conflicts with the decision of the court below is *United States v. Bohn*, 260 F. 2d 773 (C. A. 8), cert. denied, 358 U. S. 931. There, the indictment for evasion of the excise tax on wagers covered a single year. On the other hand, *United States v. Shaffer*, 291 F. 2d 689 (C. A. 7), relied on by the court below, does include separate felonies of different months in the indictment; false returns were filed. However, in that case, the defendants were sentenced to concurrent terms of imprisonment on the evasion counts.

The analogy to income taxes is inapposite. The statutory basis of the income tax is net income, and the year is an integral part of the income tax computation. *Cf. Arrowsmith v. Commissioner*, 344 U. S. 6; 26 U. S. C. (1954) §§ 1, 11. By way of contrast, the incidence of the excise tax is the gross wager accepted. 26 U. S. C. (1953) § 4401 (Appendix A, *infra*, p. 17). Moreover, the time for filing excise tax returns, unlike the case of income tax returns is fixed by Regulations rather than by statute (Appendix A, *infra*, pp. 18-19). As a consequence, the multiplicity of offenses and punishments can be regulated administratively under the result of this case in the court below.

It may be noted that in *Flora v. United States*, 362 U. S. 145, this Court had occasion to point out in another context that excise taxes are divisible into a tax on each transaction and therefore presents a different problem from income taxes.

Assuming it appropriate to separate in the indictment the felonies charged on a monthly basis, multiple punish-

ment is not and should not be a necessary concomitant, especially where, as here, the evidence shows no distinguishing characteristics of separate attempts.

In the past, this Court has concluded that where neither the wording of the statute nor its legislative history points clearly to Congressional intent to punish the pattern of conduct rather than to penalize each of a series of acts, it will follow a policy of lenity. *Bell v. United States*, 349 U. S. 81; *United States v. Universal C. I. T. Credit Corp.*, 344 U. S. 218.

The imposition of multiple punishment, in the circumstances of this case requires the supervisory action of this Court not merely in justice to the petitioner herein, but for the guidance of the federal courts.

CONCLUSION.

This petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

JACOB KOSSMAN,
LEON H. KLINE,
Counsel for the Petitioner.

February, 1963.

APPENDIX A.

UNITED STATES CONSTITUTION:

Article III, Section 2(3): "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury * * *"

Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *"

Fifth Amendment: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *"

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a * * * trial, by an impartial jury * * *"

26 U. S. C. (1954):

Sec. 4401. Imposition of Tax.

"(a) Wagers. There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of Wager. In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; * * *

(c) Persons Liable for Tax. Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

Sec. 4403. Record Requirements.

Each person liable for tax under this subchapter shall keep a daily record, showing the gross amount of all wagers on which he is so liable, in addition to all other records required pursuant to section 6001(a).

Sec. 4411. Imposition of Tax.

There shall be imposed a special tax of $50. per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

Sec. 4412. Registration.

(a) Requirements. Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

Sec. 6001. Notice of Regulations Requiring Records, Statements and Special Returns.

Every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary or his delegate may from time to time prescribe. Whenever in the judgment of the Secretary or his delegate it is necessary, he may require any person, by notice served upon such person or by regulations to make such returns, render such statements, or keep such records, as the Secretary or his delegate deems sufficient to show whether or not such person is liable for tax under this title.

Sec. 6071. Time for Filing Returns and Other Documents.

(a) General Rule. When not otherwise provided for by this title, the Secretary or his delegate shall by regula-

tions prescribe the time for filing any return, statement, or other document required by this title or by regulations.
* * *

Sec. 7201. Attempt to Evade or Defeat Tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Sec. 7203. Willful Failure to File Return, Supply Information or Pay Tax.

Any person required under this title to pay any estimated tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 Code of Federal Regulations.

§ 44.4403 [Comprises Code section 4403, see 26 U. S. C. A. (I. R. C. 1954) § 4403].

§ 44.4403-1 Daily Record.

Every person liable for tax under section 4401 shall keep such records as will clearly show as to each day's operations:

(a) The gross amount of all wagers accepted;

(b) The gross amount of each class or type of wager accepted on each separate event, contest, or other wagering medium. * * * Similarly, in the case of the numbers game, the daily record shall show the gross amount of each class or type of wager accepted on each number.

§ 44.6001 [Comprises Code section 6001, see 26 U. S. C. A. (I. R. C. 1954) § 6001].

§ 44.6001-1 Record Requirements.

(a) In General. (1) In addition to all other records required pursuant to § 44.4403.1, every person required to pay tax under section 4401 shall keep such records as will clearly show as to each day's operations:

(i) Separately, the gross amount of wagers

(a) Accepted directly by the taxpayer or at any registered place of business of the taxpayer (other than laid-off wagers),

(b) Accepted for his account by agents at any place other than a registered place of business of the taxpayer (other than laid-off wagers), and

(c) Accepted as laid-off wagers from persons subject to the tax on wagers;

(ii) With respect to wagers laid off with others, the name, address, and registration number of each person with whom the laid-off wagers were placed, and the gross amount laid off with each such person, showing separately the gross amount of laid-off wagers with respect to each event, contest, or other wagering medium * * * and

(iii) The gross amount of tax collected from or charged to bettors as a separate item.

(2) If a taxpayer has any agents or employees receiving wagers on his behalf, he shall maintain a separate

record showing the name and address of each agent or employee, the period of employment, and the number of the special tax stamp issued to each such agent or employee.

(3) A duplicate copy of each return required by § 44.6011(a)-1 shall be retained as part of the taxpayer's records.

(b) Records of agent or employee. Every person who is engaged in receiving for or on behalf of another person (at any place other than a registered place of business of such other person) wagers of a type subject to the tax imposed by section 4401 shall keep a record showing for each day (1) the gross amount of such wagers received by him, (2) the amount, if any, retained as a commission or as compensation for receiving such wagers, and (3) the amount turned over to the person on whose behalf the wagers were received and the name and address of such person.

* * *

Sec. 44.6011(a)-1. Returns.

(a) In general. Every person required to pay the tax on wagers imposed by section 4401 of the Code shall make for each month, from the daily records required by Secs. 44.403-1 and 44.6001-1, a return on Form 730 in accordance with the instructions and regulations applicable thereto. A return shall be made for each month whether or not liability has been incurred for that month. If the taxpayer ceases operations which make him liable for the tax, the last return shall be marked "Final Return." * * *

Sec. 44.6071-1. Time for Filing Return.

(a) Return on Form 730. Each return required to be made on Form 730 pursuant to Sec. 44.6011(a)-1 shall be filed on or before the last day of the first calendar month following the period for which it is made. * * *

FEDERAL RULES OF CRIMINAL PROCEDURE:

Rule 31. VERDICT.

• • •

(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

• • •

APPENDIX B.

Memorandum Opinion.

March 3, 1961.

CLARY, *J.*

This memorandum opinion supplements the Order of this Court entered on February 28th, 1961, dismissing defendant Abraham Minker's motion for the suppression of evidence and dismissal of indictment, together with his amended motion for the suppression and return of property of evidence and dismissal of the indictment.

The amended motion, which is merely an amplification of the original motion, sets forth that on October 3, 1959 a search of premises 1955 Hampden Boulevard, Reading, Pennsylvania, second floor, occupied by defendant, Abraham Minker, and his wife, was conducted by virtue of a duly authorized search warrant issued on the preceding day by the United States Commissioner in Philadelphia, Pennsylvania, and that although extensive and infensive search of the premises was made the gambling paraphernalia alleged in the search warrant to be present was not found. Further, that thereafter and without a search warrant or subpoena, without defendant's knowledge, permission, or consent, Internal Revenue Agents entered upon defendant's premises and curtilage thereof, and procured and obtained, illegally and unlawfully, evidence used in obtaining the indictment returned in this case on May 26, 1960, and which evidence the Government plans to use against him in the trial of this case fixed for March 6, 1961. A hearing thereon was ordered by the Court for Monday, February 27, 1961, at 11 A. M.

At the hearing the following facts were established and without contradiction. Minker and his wife leased the second floor apartment of premises 1955 Hampden Boulevard, in the City of Reading, Pennsylvania. The building, known as 1955 and 1957 Hampden Boulevard, each with a

separate entrance, front and back, contains four apartment units; two in each unit on the first and second floors of the respective addresses. The lease provides that Minker (and other tenants) shall keep the premises clean and shall place all trash in a receptacle provided by the Management on the premises. Pursuant to housekeeping arrangements, the Management furnished each apartment with a garbage pail which was placed on the rear steps of the apartments and it was the duty of the tenants to place the garbage paid on the curb of the street on the days on which the City of Reading collected garbage. For trash the Management provided a 55-gallon covered drum enclosed with latticework within the grounds of 1955 and 1957 Hampden Boulevard, immediately adjacent to a stairway consisting of three steps leading from the sidewalk of the side street to the level of the sidewalk in the rear of 1955 and 1957 Hampden Boulevard. This receptacle was used for trash by the four tenants in 1955 and 1957 Hampden Boulevard as well as by Superintendent Noll, whose office was in another building of the project but nearest in point of distance for the disposal of trash to the above-mentioned trash barrel. It was the duty of the Management to dispose of the trash.

A few weeks after the search of October 3, 1959, William Francis Lynn, Jr., a Special Agent of the Internal Revenue Service, accompanied by Patrick Christian Gentile, Internal Revenue Agent, called upon Isaac Noll, the Superintendent, and obtained from him the data regarding Minker's leasing of the property. At that time it was determined that one Anthony Damore, a private trash collector of the City of Reading, residing at 428 Crestmont Street in that city, had been engaged by Noll to dispose of the trash for all buildings of the project. The arrangement, then not known, to the Agents, but testified to by Noll at the hearing, was that since it was his responsibility to have the trash removed, he engaged and paid Damore to come to the premises three times a week and remove the

accumulated trash from all receptacles provided by the Management. It was a matter of complete unimportance to him how Damore disposed of the trash. He stated that once Damore took it, it was his property, and that he did not even know whether he took it to a dump or where the dump was located. Once the trash left the premises Noll's obligation was complete. Damore testified that ordinarily he comingled it with trash collected from other buildings on the project; took it to an outlying dump and merely threw it with other refuse on the dump.

After the interview with Noll, the two Internal Revenue Agents contacted Damore at his home and explained that they were making an investigation of Minker in connection with alleged gambling activities. They requested Damore to segregate the trash taken out of the barrel at 1955 and 1957 Hampden Boulevard and to turn it over to them for such use as might be warranted. The arrangement contemplated that this trash would be picked up either at Damore's warehouse in the City of Reading, or at some place on the streets of Reading, during the collection days of trash from the apartments, which were Tuesday, Thursday and Saturday. Damore testified that he thought it was his duty, as a patriotic American citizen to comply with their request and did so.

The evidence clearly shows that at no time did the Internal Revenue Agents enter upon the premises, nor did any of the so-called evidence ever come into their hands at or near the premises involved. The testimony indicates that Damore faithfully segregated the trash from the particular barrel and turned it over to the Agents for the period from November, 1959, up until February 1st of 1961. The dates, which were furnished to the defendant at the hearing, of trash collections involved in the present indictment extended from approximately November 18, 1959 to March 20, 1960.

The Agents testified that the tapes, records, slips and other data secured by them indicated the operation of a

numbers bank, a gambling casino, a pinball operation, and other matters indicating illegal gambling activities.

Defendant strongly contends that this activity of the Agents was completely illegal and falls within the proscription of *Work v. United States*, 243 F. 2d 660 (C. A. D. C. 1957). Just as strongly the Government contends that the ruling in *Abel v. United States*, 362 U. S. 217 (1960), at pages 240 and 241, controls.

It appears to the Court that this case is more nearly analogous to the *Abel* case and that the doctrine of bona vacantia applies here.

An analysis of the evidence permits of no other conclusion than that defendant Minker abandoned the property involved by placing it in the trash barrel. Superintendent Noll made his contract with Damore, and Damore lawfully removed the rubbish. It was his to do with what he pleased. He could keep it or sell it as waste paper; he could burn it, if he so desired, or he could do as he ordinarily did—place it on the dump. He could also lawfully do what he actually did do, turn it over to the Internal Revenue Agents.

Defendant argues that actually Minker never relinquished control and that he had a right to assume that the property would be destroyed and not fall into the hands of the Revenue Agents; that the agents by making the arrangement with Damore in some mysterious way made him an agent of the government so that his actions were those of a United States Agent rather than of a patriotic law-abiding American citizen, who was willing to cooperate with the government in the suppression of crime. This argument, of course, must be rejected in its totality. Minker abandoned the property. It was lawfully removed by Damore. Damore had every right, if not an absolute duty, to turn over to the Internal Revenue Agents documents evidencing the commission of a crime over which documents he exercised complete dominion. No constitutional rights of the defendant were invaded. The motion, therefore, was denied.

Opinion of Kraft, J.

August 10, 1961.

KRAFT, *J.*

Defendant moves for a judgment of acquittal or for a new trial following a jury's finding of guilty on five counts of an indictment charging willful attempt to evade and defeat wagering excise taxes owing by him, in violation of Sec. 7201, Internal Revenue Code of 1954, 26 U. S. C. 7201.[1]

The undisputed evidence established a closely organized and large-scale operation of the numbers game in and about Reading, Pennsylvania, during the latter part of 1959 and early months of 1960, the period covered by the indictment. That activity is a criminal offense under Pennsylvania law. The evidence also established in intricate detail that the participants in this enterprise had, through a variety of carefully planned stratagems, made every effort to conceal its operations.

On October 3, 1959, following an intensive investigation, Government agents raided premises in Reading and found a large numbers bank in operation. The officers seized over $4,000 in cash, together with adding machines, numbers slips, summary sheets containing code markings, and other gambling paraphernalia. Defendant Minker was not on the premises. On the same day, pursuant to a search warrant, officers made an exhaustive search of Minker's apartment in Reading. They found nothing which pertained to gambling.

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1. Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

The evidence established that Minker resided in a rented apartment which was one of four dwelling units in an apartment building on Hampden Boulevard, Reading. The tenants of all four apartments deposited their trash in a container located at the rear of the building. One Anthony Damore removed the trash from the premises three times a week, pursuant to a private contract with the superintendent of the apartment house.

On November 16, 1959, the agents requested Damore to turn over to them the trash collected from these premises. Damore readily agreed, and faithfully delivered the trash to the agents from November 18, 1959 to March 29, 1960. Minker's trash was easily identified since it was generally in a bag or a box which contained letters or other articles bearing Minker's name.

In sorting through Minker's trash, the agents came upon torn bits of adding machine tapes, envelopes and other slips of paper. Many of these fragments contained handwriting as well as adding machine figures. In what must be deemed a masterpiece of patient and persistent effort, the agents painstakingly pieced together these fragments and achieved a well-nigh perfect reconstruction of the originals. These reconstructions were assembled in two sizable volumes and introduced into evidence (G-12A, G-12B).

On March 25, 1960, Government agents raided a farmhouse in Exeter Township, a short distance outside of Reading. They found a large numbers bank in operation, and seized some $4,000 in cash, adding machines, numbers slips and other numbers paraphernalia.

Among the articles seized in the raid was a "numbers banker's summary sheet," which played a vital role in the evidence (G-7D). This was a summary of the bank's daily operations from February 29 to March 24 (1960), both days inclusive. The writers appear thereon by code designations, e.g., "Z", "C", "L", "1", etc., eleven in all. Under each code are figures representing total wagers for the day, total cash and total "hits", if any. The evidence indicated that

"cash" represented wagers less writer's commission, generally 35%. The summary sheet also contained a column for expenses, covering such items as pads, rent, phone, etc. The figures appearing on the summary sheet, either separately or in combination, corresponded exactly with the figures on the reconstructed adding machine tapes and other memoranda recovered from Minker's trash, day by day throughout the period covered by the summary sheet. The detailed analysis and comparison of the figures by the Government's experts could leave no doubt in any reasonable mind that the two sets of figures reflected the same series of transactions.

The Government produced a handwriting expert who testified that in his opinion, based on proved or admitted specimens, the handwriting on the re-assembled bits of paper was that of Minker.

The materials obtained from Minker's trash, together with the summary sheet seized in the second raid (G-7D), enabled the Government's accountants to calculate, to a high degree of accuracy, the gross amount of the wagers for each of the five months from November 1959, through March 1960.

Finally, the Government's evidence established that Minker had filed no tax returns for the months in question.

Defendant did not take the stand and submitted no evidence in answer to the Government's case.

Defendant's first contention is that the evidence was insufficient to warrant the conclusion, beyond a reasonable doubt, that defendant was under a duty to pay the tax. Boiled down to its essence, the argument is that the proofs fail to establish a proprietary interest in the lottery, that they were equally consistent with a finding that defendant "was only a means of transmitting information." The question was clearly for the jury, and its verdict was the only reasonable one possible under the evidence. The records pieced together from defendant's trash showed the defendant in possession of complete summaries of the bank's

operations, including the totals of the wagers, the cash, the "hits", the net profits—even the day-to-day expenses. The information was of the kind that would only be supplied to the "banker". When it appears that defendant received this detailed information day after day for a period of over four months, the inference is inescapable that defendant was the proprietor of the enterprise. On these tapes and bits of paper were notations and calculations, in defendant's handwriting, of a nature clearly indicating a financial interest. Any reasonable doubt at this point, is resolved by defendant's disposition of this information. His destruction and discarding of the records is clearly indicative of ownership, and renders specious the argument, unsupported by evidence, that defendant was a mere "bookkeeper", or a "transmitter" of the information.

Equally wanting in merit is defendant's contention that the verdict was against the weight of the evidence and that a new trial should be granted.

Defendant's next contention is that the evidence was insufficient to warrant the conclusion, beyond a reasonable doubt, that defendant had the necessary intent to evade and defeat the tax. He asserts that at most the Government proved only a willful failure to file a return and willful failure to pay the tax, which is insufficient to prove the felony under Sec. 7201 of the Code. Defendant's contention is without merit.

The authority in point, of course, is the landmark decision in Spies v. United States, 317 U. S. 492 (1943), in which the Supreme Court laid down the distinction between the corresponding felony and misdemeanor provisions in the 1939 Code (p. 498):

> "The difference between the two offenses, it seems to us, is found in the affirmative action implied from the term 'attempt,' as used in the felony subsection . . . We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues,

Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.

"Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition construct the scope of the Congressional provision that it may be accomplished 'in any manner.' By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, *destruction of books or records*, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime." (Emphasis supplied.)

The Government proved more than "willful but passive neglect of the statutory duty." The evidence disclosed "affirmative action," "willful commission" and "conduct, the likely effect of which would be to mislead or to conceal,"—all demonstrative of an attempt to evade and defeat the tax. There were the studied attempts to conceal the existence and operation of the lottery, the sinuous and furtive comings and goings of the operators, the burning of numbers bets and tapes at the time of the second raid, and

Minker's destruction and discarding of records at his apartment. Defendant asserts that the clandestine and surreptitious operation "was obviously for the purpose of avoiding detection of operations in violation of local gambling laws." It is a fair inference that it was for the purpose of avoiding detection of any illegal conduct, for there is no suggestion that Minker discriminated in his efforts to escape the flagellation of the law. At any rate, this evidence, taken in connection with defendant's repeated and persistent failure to file a return and pay the tax, afforded ample basis for the jury's finding. As stated in *Spies*, supra, at page 500, "such inferences are for the jury."

Defendant's complaint that the Government failed to prove a genuine standard of defendant's handwriting is utterly without foundation.

The Act of Congress provides (28 U. S. C. 1731):

> "The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person."

The Government produced W. E. Hartman, a public accountant, who testified that he had done work for defendant for some years; that he had seen defendant write "a dozen or more times"; that he was able to form an opinion with respect to whether particular handwriting was that of defendant. The Government introduced into evidence a page from defendant's checkbook containing handwritten figures, some pencilled and others in ink (G-1A). Hartman testified that in his opinion the pencilled notations were in defendant's handwriting; that as to those in ink, he could not express an opinion. With respect to the handwriting on five cancelled checks purportedly drawn by Minker, the witness testified, "It appears to be his handwriting" (G-2). Finally, there was admitted into evidence a signature card, with the stipulation that if the President of the bank were

called as a witness, he would testify that the signature on the card was that of the defendant, signed by him in the officer's presence (G-3).

In the face of this testimony, particularly in view of counsel's own stipulation, the argument that there was wanting "a genuine standard" of defendant's handwriting borders on the frivolous. The exhibits afforded a substantial basis for purposes of comparison, and their admission into evidence was eminently proper. Their weight was for the jury. United States v. Angelo, 153 F. 2d 247, 251 (3d Cir. 1946).

Defendant further complains that the indictment fails to charge a felony under 26 U. S. C. 7201, and it was error to permit the jury to find defendant guilty of a felony. There is no merit in this contention.

The *Spies* case, as already noted, carefully distinguished the felony and the misdemeanor provisions of the 1939 Code (Sections 145(a), 145(b)), and the distinction is equally pertinent under the present Code. It has been seen that the gist of attempted evasion is "affirmative action implied from the term 'attempt', as used in the felony subsections" (317 U. S. 492, 498). The essence of the misdemeanors, on the other hand, is *inaction*. Willfulness, of course, is a necessary ingredient of both offenses. The difference is summed up in a single sentence in *Spies* (317 U. S. 492, 499): "We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues, Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors."

The present indictment was drawn with this distinction in mind. It charges in material part that defendant "did willfully and knowingly attempt to evade and defeat the said excise tax . . . by failing to make such excise tax return . . . by failing to pay . . . the said excise tax . . . and by concealing and attempting to conceal from all proper officers of the United States of America the true

and correct amount of wagers. . . ." Defendant argues that no active steps of concealment were alleged in the indictment. We think affirmative action is implied from the term "conceal" itself. Even if it isn't, the requirement of affirmative action is supplied by the phrase "attempting to conceal." We are of the firm conviction that the indictment fully satisfies the requirements of the law.

Defendant's next contention is that the Court erred in failing to charge, as requested, that defendant could be found guilty "of the lesser included offenses."

Rule 31(c) of the Federal Rules of Criminal Procedure provides: "The defendant may be found guilty of an offense necessarily included in the offense charged . . . ." Defendant contends that we erred in failing to submit to the jury as lesser included offenses the misdemeanors of *willful* failure to make a return and *willful* failure to pay the tax. Had this indictment charged that the means of attempted evasion were *willful* failure to make a return and *willful* failure to pay the tax, we would have charged as requested on lesser included offenses. However, to determine whether a lesser offense is necessarily included in the offense charged, resort must first be had to the statute and, thereafter, if need be, to the indictment.

The test to be employed in determining whether a violation of 26 U. S. C. § 7203 is a lesser offense necessarily included in a violation of 26 U. S. C. § 7201, is whether it is possible to commit the greater offense without having first committed the lesser. James v. United States, 238 F. 2d 681, 683 (9th Cir. 1956). The offense created by § 7201 is not one which, by its very definition, necessarily includes a lesser offense or offenses in the sense that a common law, murder for example, includes manslaughter, and robbery involves both assault and larceny.

Rather, the crime denounced by § 7201, from its inherent nature, is imprecise in scope and indefinite in content, and is perhaps incapable of exact definition. The statute forbids an attempt to evade "in any manner." The possi-

ble manners by which evasion may be attempted are legion, and are coexistensive with human capacity for management, trickery and deceit. Since the lesser § 7203 misdemeanors are not necessarily included in the § 7201 felony, we must next examine the indictment to ascertain whether in its allegation of the means employed in the attempted evasion, the § 7203 offenses are charged. We find that, except for the significant omission of "willful", they are; but that omission is fatal, for without it no § 7203 misdemeanor is included. Neither failure to file a return nor failure to pay the tax is a misdemeanor unless such failure is willful.

By the omission from the indictment of charges of willful failures to file and to pay, the Government undertook to prove a willful attempt to evade, or, failing that, to suffer the defendant's acquittal. It was entitled to no conviction of a lesser offense, nor was the defendant entitled to the requested charge on the indictment so drawn. To the contrary, had we charged in this indictment as the defendant requested and had he been found guilty of a § 7203 misdemeanor thereunder, we would then be met with his contention that the verdict would support no judgment and sentence because the indictment, charging no *willful* failure to file or to pay, alleged no crime defined by 26 U. S. C. § 7203.

Defendant next complains that the charge to the jury contained fundamental errors necessitating a new trial.

In the course of a necessarily lengthy charge, we instructed the jury as follows:

> "If, on the other hand, you are persuaded of the existence of the lottery during this period, that Minker conducted it, and while so conducting it, that he willfully and knowingly attempted ~~to evade~~ and defeat any excise tax due and owing the Government of the United States, and that the amount was either what the Government contends, or, if not, was a substantial amount, *then you would find him guilty.*"

Counsel argues that the italicized clause is "the equivalent of a direction to find the defendant guilty." It is noth-

ing of the kind. It is, in effect, a direction to the jury that *if* they were persuaded of the existence of all the elements of the offense charged, they would find defendant guilty. The jury would do precisely that, if they performed their sworn duty. Counsel failed to object to this part of the charge although afforded ample opportunity to do so, and, in the absence of fundamental error, his objection comes too late. F. R. Cr. Proc. 30.

Error is predicated on the submission to the jury of the question whether defendant's attempt at concealment were for the purpose of evading "local gambling laws," or with the intent of evading or defeating the excise tax. It is urged that there was no evidence to permit a jury finding "that evasion of the excise tax was a motive behind the method of operation, and that any conclusion to that effect would be pure speculation." There was, of course, no *direct* evidence on the element of motivation. Motivation, like any other intellectual abstraction, is seldom susceptible of direct proof. It is impalpable, imponderable, and exists only in idea and abstract contemplation, and any conclusion in relation thereto must be reached circumstantially. Defendant knew, or must be presumed to have known, of the existence of an excise tax on wagers—indeed, one of the Government officers explicitly apprised him of the fact—just as he knew that the "numbers game" was violative of state law. Nevertheless, he sedulously avoided compliance with the Federal law, just as he consistently scorned and derided observance of the local law. It is reasonably inferable, therefore, that his studied attempts at concealment were with the purpose of evading and defeating the excise tax, as well as avoiding detection of State law violations. We need not speculate as to the relative weight of these considerations,—much depends upon the "local climate". The evidence afforded a reasonable and substantial basis for inference, and it is not to be assumed that the jury was altogether unfamiliar with the complexities and ambiguities of human motivation. The question, therefore, was properly submitted to the jury.

Defendant and John Wittig, with others, were indicted in counts 1 and 2 for attempted evasion of wagering taxes for the months of September and October, 1959. At the close of all the evidence, we granted defendant's and Wittig's motions for judgments of acquittal on these counts. Defendant contends that it was a "fundamental requirement" that the Court direct the jury to disregard all the evidence admitted in support of these two charges. Counsel made no motion to that end, and failed to object to the charge on that ground. We do not believe that defendant was prejudiced in the slightest degree by this omission, if such it was, and the objection therefore comes too late.

We have carefully considered defendant's remaining complaints concerning the charge. Counsel failed to make timely objection in respect of any of them, and we find them so wanting in merit as not to require discussion.

Defendant's final contention is that it was a violation of his constitutional rights to admit into evidence the records obtained from the trash container. This issue was decided, adversely to defendant's contention, in proceedings on his motion to suppress. Judge Clary's opinion and order of March 3, 1961, established the law of the case, from which we have no disposition to depart. Defendant asserts that the trial on the indictment developed facts not presented to Judge Clary, and that we should therefore re-examine the question. Our review indicates that defendant errs in his premises. Every fact and circumstance material to the issue was given careful consideration on the defendant's motion to suppress.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,854.

UNITED STATES OF AMERICA

v.

ABRAHAM MINKER, ALSO KNOWN AS ABE MINKER,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued October 4, 1962.

Before STALEY and FORMAN, *Circuit Judges*, and LANE, *District Judge*.

Opinion of the Court.

(Filed December 4, 1962.)

By STALEY, *Circuit Judge*.

Appellant, Abraham Minker, was convicted on five counts of a seven-count indictment charging him with willfully attempting to evade wagering excise taxes in violation of the Internal Revenue Code of 1954, § 7201.[1] The rele-

1. "7201. Attempt to evade or defeat tax

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution." 26 U. S. C. A. (I. R. C. 1954) § 7201.

vant period of alleged attempted evasion included November 1959 through March 1960. Each month of that period was charged as a separate violation.

During the summer of 1959, agents of the Internal Revenue Service conducted an intensive investigation of gambling operations in the vicinity of Reading, Pennsylvania. Suspected numbers writers and operators were placed under surveillance. On several evenings during this period, one of the suspects was observed entering appellant's second-floor apartment at 1955 Hampden Boulevard, Reading, Pennsylvania, with a package. On each of these occasions the visitor emerged from the apartment without the package.

On October 3, 1959, a raid was conducted on premises located at 728 Lancaster Avenue, Reading, Pennsylvania. Numerous adding machines, numbers slips, summary sheets, and various other articles essential to a large scale numbers operation were seized. On the same day, appellant's apartment was searched pursuant to a warrant. However, no evidence incriminating him in the gambling operation was found. On March 25, 1960, the government conducted another raid on a numbers bank in a farmhouse in Berks County. Again various adding machines, numbers slips, a tally sheet, and other pertinent articles were seized. However, no direct evidence of Minker's participation in the lottery was found. In the interval between the two raids, government agents had arranged with Anthony Damore, a trash collector, to permit them to examine the contents of a trash receptacle located on the premises of the Hampden Boulevard apartment building, but outside the structure. The management of the apartment house had hired Damore to remove the trash three times a week. The receptacle was used by four tenants, as well as the building superintendent. The contents were examined off the premises, and the agents retained certain adding machine tapes and other slips of paper. Handwriting identified as

Minker's appeared on many of these items. It is the taking of these articles from the trash cans that is challenged here as being an unreasonable search and seizure.

Prior to trial appellant presented a motion to suppress this evidence. The district court, after hearing, denied the motion, holding that Minker had abandoned the articles prior to the seizure by the government. At the trial objection was made to the introduction of this evidence. We think it abundantly clear that not only had Minker abandoned the property but, in addition, that the trash can was located outside an area that would entitle him to constitutional protection.

Whether a given area is within the protected curtilage of one's dwelling depends upon a number of factors, including its proximity to the dwelling, whether it is within the enclosure surrounding the dwelling, and its use as an adjunct to the domestic economy of the family. Care v. United States, 231 F. 2d 22 (C. A. 10), cert. denied, 351 U. S. 932 (1956). Of course, factors of paramount importance in considering a Fourth Amendment claim are the nature of the individual's interest in and the extent of the claimed privacy of the premises searched. Jones v. United States, 362 U. S. 257 (1960).

As we have previously noted, Minker's apartment was on the second floor of the building, whereas the receptacle was located outside the structure. The management of the apartment house placed the receptacle on the premises and made the agreement with Damore for the removal of the trash. More important, appellant's interest was confined to the right to use it in common with three other tenants in addition to the building superintendent. We conclude that such an insubstantial interest does not give him standing to assert a constitutional right against a search of the receptacle's contents.

Abandonment, of course, is largely a question of intent. United States v. Wheeler, 161 F. Supp. 193, 198 (W. D. Ark., 1958). Intent, in turn, is a question of fact. Schauffler v.

United Ass'n of Journeymen & Apprentices of the Plumbing Industry, Local 420, 230 F. 2d 572, 576 (C. A. 3), cert. denied, 352 U. S. 825 (1956). The district court, in denying the motion to suppress, filed a memorandum opinion [2] in which it fully set forth the facts upon which it based its holding that there had been an abandonment. We need not here again recite them but need only say that they amply support its conclusion. The appellant cites United States v. Merritt, 293 F. 2d 742 (C. A. 3, 1961), and Work v. United States, 243 F. 2d 660 (C. A. D. C., 1957). Those cases are inapposite. In both of them, the acts which revealed the evidence were the direct consequence of an illegal entry. This was true also in Polk v. United States, 291 F. 2d 230 (C. A. 9, 1961), although the decision there turned upon whether the area was within the protection of the Fourth Amendment.

Minker challenges the sufficiency of the evidence to connect him with the lottery and to establish his intent to evade the tax. Of course, since the jury has brought in a verdict of guilty, we must view the evidence together with all inferences reasonably and logically deducible therefrom in the light most favorable to the government. Glasser v. United States, 315 U. S. 60, 80 (1942); United States v. Giuliano, 263 F. 2d 582 (C. A. 3, 1959). From the facts adduced the jury could reasonably have found that the papers in the trash can contained the handwriting of the appellant; that amongst these papers were daily summaries of gross wagers, expenses, and net profits of the entire numbers enterprise; that they were computed for the owner or operator of the lottery; that Minker was the owner or operator of the lottery; that they were records required to be kept for computing the taxes in question; and that appellant had destroyed them. We think that the surreptitious nature of the operation of the lottery by one in control of it and the destruction of the records in the trash receptacle was

2. United States v. Minker, 191 F. Supp. 683 (E. D. Pa. 1961).

evidence not merely of a passive failure to keep records or pay the tax, but of a willful intent to evade and defeat the tax. Such conduct falls squarely within that proscribed in Spies v. United States, 317 U. S. 492, 499 (1943). See also Ingram v. United States, 360 U. S. 672 (1959). We might add here that the district court carefully instructed the jury that if the destruction was for the sole purpose of avoiding prosecution under state law the necessary intent would not be established.

It is urged that these were not records of the sort required to be kept. But in several instances this information indicated the daily gross wagers of the lottery. Hence, this data was required to be maintained by § 4403 of the Internal Revenue Code of 1954.[3] The fact that a similar summary was retained at the numbers bank is immaterial, for the jury, by its verdict, found that the records in the trash can were in fact those of the operator of the lottery.

In this regard appellant's reliance on United States v. Plisco, 192 F. Supp. 337 (D. D. C. 1961), is misplaced. The question treated there was the admissibility of such records into evidence as an exception to the hearsay rule. Indeed, that decision would appear to support our conclusion since the court found that the purpose of the records was to provide documentary support in dealings with the Internal Revenue Service.

Consistent with his assertion that the government proved only a failure to file, appellant urges that he was entitled to have the jury instructed on this lesser offense.[4]

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3. "§ 4403. Record requirements

"Each person liable for tax under this subchapter shall keep a daily record showing the gross amount of all wagers on which he is so liable, in addition to all other records required pursuant to section 6001(a)." 26 U. S. C. A. (I. R. C. 1954) § 4403.

4. "§ 7203. Willful failure to file return, supply information, or pay tax

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under

It is to be noted that the indictment does not charge that the failure to file was willful.[5] More important, the only evidence of a willful failure to file, i.e., the destruction of the records and the clandestine operation of the lottery, was the very evidence tending to prove a willful attempt to evade. Hence, the jury would have had no basis for finding Minker innocent of the felony but guilty of the misdemeanor. In these circumstances, the two offenses covered the same ground. Accordingly, appellant was not entitled to the requested instruction. See Berra v. United States, 351 U. S. 131 (1956).

It is asserted that the following portion of the district court's instruction is the equivalent of a directed verdict of guilty:

> "If, on the other hand, you are persuaded of the existence of the lottery during this period, that Minker conducted it, and while so conducting it, that he willfully and knowingly attempted to evade and defeat any excise tax due and owing the Government of the United States, and that the amount was either what the Government contends, or, if not, was a substantial amount, then you would find him guilty."

Quite apart from the fact that no objection was made to this charge as required by Rule 30, Fed. R. Crim. P., the

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authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution." 26 U. S. C. A. (I. R. C. 1954) § 7203.

5. The material part of each count charges that Minker

> "* * * did willfully and knowingly attempt to evade and defeat the said excise tax * * * by failing to make such excise Tax Return * * *; by failing to pay * * * the said excise tax due * * * and by concealing and attempting to conceal from all proper officers of the United States of America the true and correct amount of wagers accepted * * *."

quotation of the instruction eviscerates the argument. The court merely advised the jury that if the government proved its case, Minker was to be found guilty. Hewitt v. United States, 110 F. 2d 1, 10 (C. A. 8), cert. denied, 310 U. S. 641 (1940).

Appellant cites no case for the proposition that sentences on separate counts for each month of attempted evasion are improper. Indeed, he concedes that gambling excise tax returns must be filed monthly and that the taxes are due monthly. This is the unit of time which is the basis for the tax, just as a year is the period for which income taxes are due. This being so, each month of attempted evasion constituted a separate offense. See United States v. Shaffer, 291 F. 2d 689 (C. A. 7), cert. denied, 368 U. S. 915 (1961).

We have considered the other questions raised and find them to be without merit.

The judgment of the district court will be affirmed.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,854.

UNITED STATES OF AMERICA

v.

ABRAHAM MINKER, ALSO KNOWN AS ABE MINKER,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: STALEY and FORMAN, *Circuit Judges*, and LANE, *District Judge*.

Judgment.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

December 4, 1962.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,854.

UNITED STATES OF AMERICA

v.

ABRAHAM MINKER, ALSO KNOWN AS ABE MINKER,
Appellant.

Sur Petition for Rehearing.

Present: STALEY, HASTIE, FORMAN, SMITH, *Circuit Judges*, and LANE, *District Judge*.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By THE COURT

STALEY.

Dated: January 16, 1963.

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JOHN F. DAVIS, CLERK

No. 820

In the Supreme Court of the United States

OCTOBER TERM, 1962

ABRAHAM MINKER, ALSO KNOWN AS ABE MINKER,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 38–44) is not yet reported. Opinions of the district court (R. 22a–25a, 176a–186a; Pet. App. 23–37) are reported at 191 F. Supp. 683 and 197 F. Supp. 295.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1962 (Pet. App. 45). A petition for rehearing was denied on January 16, 1963 (Pet. App. 46). The petition for a writ of certiorari was filed on February 12, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether documents abandoned by petitioner in a trash receptacle near his apartment and delivered by a trash collector to government agents were properly admitted in evidence.

2. Whether the court properly refused a request by petitioner, charged with the felony of attempted evasion of wagering taxes, for an instruction that the jury might find him guilty of the lesser included misdemeanor of wilful failure to file a return or to pay the taxes.

3. Whether the evidence was sufficient to support petitioner's conviction for wilfully attempting to evade wagering taxes.

4. Whether consecutive sentences could be imposed for separate monthly attempts to evade the payment of wagering taxes, which are due monthly.

STATUTES, REGULATIONS AND RULE INVOLVED

Relevant portions of 26 U.S.C. 4401, 4403, 6001, 6071, 7201 and 7203; 26 C.F.R. (1961 ed.) 44.4403–1, 44.6001–1, 44.6011(a)–1 and 44.6071–1; and Rule 31 of the Federal Rules of Criminal Procedure are set forth in Appendix A of the petition (Pet. 17–26).

STATEMENT

Petitioner and others were charged in the United States District Court for the Eastern District of Pennsylvania under a seven-count indictment with violations of 26 U.S.C. 7201, for wilfully attempting to evade wagering excise taxes due under 26 U.S.C. 4401 for the months of September 1959 through

March 1960, inclusive (R. 5a–12a). The court ordered petitioner's acquittal on counts 1 and 2 (R. 169a), and the jury found him guilty on counts 3 through 7, inclusive (R. 166a). Petitioner was sentenced to imprisonment for a period of one year on each of counts 3, 4, 5 and 6, to run consecutively, and on count 7 imposition of sentence was suspended and petitioner was placed on probation for five years, to begin at the time of his release under the sentence imposed on count 6. Fines were imposed in the amount of $2,500 on count 3, $5,000 on count 4, $7,500 on count 5, $10,000 on count 6, and $10,000 on count 7 (R. 188a). On appeal the conviction was affirmed (Pet. App. 45).

1. Prior to trial petitioner filed a motion for suppression of evidence, claiming that certain gambling paraphernalia had been illegally seized from a trash receptacle near his apartment (R. 14a, 16a–18a). The district court after a hearing denied this motion (R. 21a). A renewed motion to suppress this evidence was denied at the trial (R. 54a–55a, 173a).

Mr. Noll, the superintendent of the four-family apartment in which petitioner was a tenant, testified that the tenants were required to dispose of their trash in the receptacle provided them. All four tenants and the superintendent used the same trash receptacle, which was about four feet beyond the building line near some bushes and a lattice-work trellis (R. 43a–46a, 48a–49a). Noll had a verbal contract with a Mr. Damore for the removal of the trash three days a week. No limitations were imposed

upon Damore as to disposal of the trash after he took it away (R. 45a).

Damore testified that he would customarily deliver the trash to a dump where it was burned (R. 36a, 40a). At the request of government agents, Damore turned over to them the trash from the house in which petitioner lived for the period from November 18, 1959, to March 29, 1960 (R. 61b, 36a–39a). The agents pieced together adding machine tapes and papers considered pertinent to their investigation of petitioner (Gov. Exhibits G–12A and G–12B). Petitioner's trash was readily distinguishable from that of the other tenants, since it was found in a bag or box with newspapers, napkins and prescription bottles bearing his name (R. 63b, 52a–53a).

2. At the trial the evidence showed that on numerous dates in August and September 1959 (R. 5b–18b), December 1959 (39b–41b), and February and March 1960 (R. 24b–33b, 41b–45b), a government agent on surveillance observed some of the defendants meeting together in the afternoon at the same place, passing brown envelopes to each other, and engaging in similar activities usual in a numbers operation. On March 3, 1960, agent Gentile asked petitioner if he was in the business of accepting wagers, and petitioner made no reply. The agent told petitioner about the legal requirements for a $50 occupational stamp tax, the filing of monthly returns as to gross wagers, and the 10 percent tax due thereon (R. 100a–101a).

On March 25, 1960, at a farmhouse near Neversink Road where a number of persons (not including pe-

titioner) had been seen, agents seized three adding machines, numbers slips, $4,000 in cash, a gun and gambling paraphernalia (R. 33b–36b). One item seized in the raid was a numbers bank summary for March 1960 (Gov. Ex. 7–D; R. 176b), which had accounts for each major number writer by coded symbol. The first column showed the gross wagers accepted by the writer. The second column indicated 65 percent of the first column, being the net cash to the bank after deduction of the writer's 35 percent commission. The third column listed the "hits" upon which the bank would have to pay out. All of these figures, together with the expenses incurred by the bank, were recorded on the bank summary sheet (Gov. Ex. 7–D; R. 51b–54b).

Testimony of agent Lynn included a line-by-line comparison and reconstruction analysis of figures reflected on the bank summary statement (Gov. Ex. 7–D) with figures and totals appearing on the tapes and written memoranda found in petitioner's trash (Gov. Ex. 12–A and 12–B). Handwritten memoranda found in the trash were shown, by expert testimony, to be in petitioner's handwriting (R. 89a–94a, 28a–30a). In numerous instances the amounts appearing on the tapes from petitioner's trash corresponded exactly with the amounts on the bank summary statement (e.g., R. 73b–74b, 78b–81b). Agent Lynn in his analysis testified as to the net profit of the numbers operation for periods in November and December 1959 (R. 133b–146b), January 1960 (R. 118b–132b), February 1960 (R. 113b–118b) and March 1960 (R. 67b–97b). The gross wagers for the months

in issue varied from $86,000 to $111,000 per month (R. 171b–172b).

ARGUMENT

1. There was no violation of petitioner's rights under the Fourth Amendment (see Pet. 8–10). The trash receptacle was located in an area beyond the second floor apartment premises which petitioner occupied. Petitioner's only interest in the trash receptacle was his right to use it in common with the other persons in the house. There was no interference with petitioner's privacy and no unauthorized search of the apartment where he lived. In these circumstances the court of appeals properly held that petitioner did not have standing to challenge the search and seizure. The instant case is not like *Jones* v. *United States*, 362 U.S. 257, and *United States* v. *Jeffers*, 342 U.S. 48, in each of which the accused had a right to be present in the apartment and hotel room, respectively, where the search occurred.

But even if it be assumed that petitioner did have requisite standing, there was no invasion of petitioner's rights since he abandoned the property in question when he placed it in the trash receptacle. Cf. *Abel* v. *United States*, 362 U.S. 217, 241; *Hester* v. *United States*, 265 U.S. 57, 58. Neither petitioner nor the apartment superintendent had any interest in what the trash collector did with the trash so long as he disposed of it. Damore acted properly in turning over the trash, and the agents acted properly in examining it.

2. The district court properly refused petitioner's request No. 7 for a charge that the jury could con-

vict petitioner of a lesser included offense under 26 U.S.C. 7203 (R. 158a, 171a).[1]

The crime defined in 26 U.S.C. 7203 of wilful failure to file or to pay a tax is not a lesser included offense under 26 U.S.C. 7201, punishing an attempt to evade or defeat the tax. A lesser included offense is one where all elements of the lesser offense must necessarily enter into the greater, and only some additional element of aggravation need be shown to prove the greater. 1 Wharton, *Criminal Law* (12th ed. 1932), sec. 33; *Ekberg* v. *United States*, 167 F. 2d 380, 389 (C.A. 1). See *Berra* v. *United States*, 351 U.S. 131, 134. Proof to establish wilful evasion of a tax does not require proof of wilful failure to file. Hence, even though in a particular instance the means of evasion may include failure to file, the *offense* of wilful failure to file is not included in the *offense* of tax evasion. In *Chaifetz* v. *United States*, 366 U.S. 209, this Court reversed, with directions to vacate, a conviction for the offense of wilfully failing to supply information required by law, which had been submitted to the jury as a lesser included offense of the crime of attempted evasion. In that case one of the means of evasion was failure to supply information,

[1] This rejected charge read in pertinent part that "* * * if you find * * * that [petitioner] was required to file a return and pay the excise taxes on wagers, and if, you find * * * that [petitioner] willfully failed to file such returns and to pay such taxes, but you further find that [petitioner] did not willfully attempt to evade the excise taxes, you will find [petitioner] not guilty of the charge contained in the indictment, but guilty of the lesser offense included in the offense charged in the indictment, that is, the offense of willfully failing to make returns and to pay the excise taxes" (R. 171a).

but the ruling of this Court establishes that the offense as such is not included in the offense of tax evasion. Similiarly here, the offense of failure to file as such is not a lesser included offense in the crime of tax evasion.

3. Petitioner contends that the evidence was insufficient to support his conviction in that the prosecution failed to show that he had a proprietary interest in the wagering lottery (Pet. 12–13). The issue was submitted to the jury under a charge that petitioner should be convicted only if the jury found that he had conducted the lottery (R. 141a–142a). The court also instructed as follows (R. 147a):

> The word "conduct," as used in the statute, means to carry on, or to manage, or to have the direction of, coupled with a proprietary interest, that is with an ownership interest. That doesn't mean necessarily the sole and exclusive owner, but an ownership interest in some part, a proprietary interest, as defendant [*sic*] counsel himself used the word in his argument, an ownership interest coupled with the carrying on or the having the direction of the lottery.

The jury's finding that petitioner had conducted the lottery was clearly warranted from the evidence showing daily records of wagers, code numbers of writers, net cash for the bank, day-to-day expenses, and lottery "hits". These documents constituted the kind of information which would be needed by the banker or proprietor of a numbers operation. Moreover, a number of the notations and calculations on documents taken from petitioner's trash were in his own hand-

writing. Then too, the fact that petitioner had ultimate dominion over, and possession of the daily record tapes which he disposed of in the trash, also tended to show that he was the proprietor of the lottery.

4. The court had authority to impose consecutive sentences for each month of attempted tax evasion (see Pet. 13-15). The normal unit for tax prosecutions is the period when the tax is due—yearly for income taxes, quarterly for such taxes as social security and withholding taxes, monthly for such taxes as admissions tax or wagering tax. See *United States v. H.J.K. Theatre Corp.*, 236 F. 2d 502 (C.A. 2), certiorari denied, 352 U.S. 969, where the monthly unit was used as to admissions taxes, and *United States* v. *Shaffer*, 291 F. 2d 689 (C.A. 7), certiorari denied, 368 U.S. 915, where separate sentences for monthly violations of 26 U.S.C. 7201 were upheld.

The distinction advanced between wagering and income taxes, that monthly wagering tax returns are required by regulations and yearly income tax returns by statute, is not of controlling importance and does not destroy the analogy between the two. In both instances a separate offense is involved for the particular time period of delinquency.[2]

The instant case is analogous to *United States* v. *Guterma*, 281 F. 2d 742, 752 (C.A. 2), certiorari denied, 364 U.S. 871, holding that separate fines could be imposed as punishment on substantive counts

[2] There is nothing in *Bohn* v. *United States*, 260 F. 2d 773 (C.A. 8), certiorari denied, 358 U.S. 931, to indicate that consecutive sentences could not be imposed in the instant case, even though the counts there for violations of 26 U.S.C. 7201 were for periods of more than a month.

for each monthly failure to file with the Securities and Exchange Commission insider's reports required by statute. The court rejected the argument that the offenses sprang from a single impulse, so as to make *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, applicable. See also *Swepston* v. *United States*, 289 F. 2d 166, 168–169 (C.A. 8), certiorari denied, 369 U.S. 812 (consecutive sentences valid for filing separate false claims for income tax refunds, though defendant may have had but one overall scheme to defraud); *United States* v. *Alaimo*, 297 F. 2d 604, 605–606 (C.A. 3), certiorari denied, 369 U.S. 817 (each unlawful payment a separate offense under the Labor Management Relations Act).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1962.

No. 820.

ABRAHAM MINKER, also known as Abe Minker,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITIONER'S REPLY MEMORANDUM.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 820.

ABRAHAM MINKER, ALSO KNOWN AS ABE MINKER,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONER'S REPLY MEMORANDUM.

Because of the nature of the government's Brief in Opposition to the application for a writ of certiorari, the petitioner believes that a short reply is necessary.

1. The trash receptacle, the entire contents of which were systematically taken by the government agents, was kept in a usual and customary place for such a household facility. As a household facility, the receptacle was as to both location and usage an integral part of petitioner's household. No case hitherto has circumscribed the constitutional protection so as to exclude the physical area here involved. Moreover, it is submitted that living in an apartment, and therefore being required to share certain necessary facilities, does not include a loss of standing to claim constitutionally guaranteed rights.

It is emphasized that just days prior to the commencement of the seizures here involved, raids upon a number of

places where evidence of a gambling operation was found produced nothing to implicate the petitioner in any way. A simultaneous raid upon his apartment produced nothing to implicate him in a gambling operation or to connect him with the other defendants referred to by the government. At the trial, the only defendant who was supposed to constitute the link between the petitioner and the operation was acquitted by direction of the district court. *The search in this instance was for incriminating evidence.* Greater vigilance for the protection of constitutional rights is indicated, and greatest restraint upon the government's intrusion is demanded. *Abel v. United States,* 362 U. S. 217, 237; *cf. Frank v. Maryland,* 359 U. S. 360 (1959). In the attempt to obtain such evidence the government agents merely arranged for another to do what they themselves were not authorized to do: enter upon the premises, within the curtilage, and seize generally all of the contents of the trash receptacle. Certainly there was no abandonment within the circumstances so carefully circumscribed by this Court in *Abel v. United States, supra.* To hold otherwise would permit government agents to accomplish their objective by using employees such as chambermaids, bellhops, janitorial personnel and the like to remove the contents of trash baskets which have been placed in containers or incinerators outside one's apartment but within the "curtilage" for delivery to government agents.

2. It must be emphasized that in this case the indictment charged willful attempt to evade by means of the failure to file returns, to pay the excise taxes and concealment of information. Plainly the willfulness alleged as to the attempt to evade applies to the means by which the evasion was effected. It must follow, therefore, that the elements of the lesser offense must be proved in order to prove the greater offense. In classic terms, the lesser offense is necessarily included in the indictment, and this is borne out in

the proofs and argument of the government in the district court in this case.

The case of *Chaifetz v. United States*, 181 F. Supp. 57, aff'd, 288 F. 2d 133 (D. C. Cir. 1960), rev'd in part on suggestion of error 366 U. S. 209, is not adequately represented to this Court by the government in its Brief in Opposition (p. 7). Examination of the proceedings in that case discloses that the indictment charged evasion by the *filing of false returns*. Clearly, then, the case is inapposite. It is submitted that the decision below, in refusing in the circumstances of this case to render a charge, as requested, on lesser included offenses, is at variance with settled law and Rule 31(c) of the Federal Rules of Criminal Procedure.

Rule 31(c) comprehends that a lesser offense is "necessarily included" if it is fairly charged by the indictment. A lesser offense is fairly charged if it is included in the acts alleged in the indictment as constituting the greater offense, as it most certainly was here, whether or not the greater may be committed without perpetrating the lesser. Rule 31(c) was a restatement of existing law, 18 U. S. C., former § 565, which provided that "the defendant may be found guilty of any offense the commission of which is *necessarily included in that with which he is charged in the indictment.*" There is no suggestion of a limitation such as urged by the government. Although the theory of the necessary included offense may postulate a gradation in which the greater offense contains some aggravating incident not found in the lesser (which is the case here), an accepted corollary is that where the indictment not only charges the major offense but also in terms the lesser offense, the accused may be convicted of the lesser offense even though not forming a constituent part of the major offense charged. 42 C. J. S. § 271, p. 1295.

3. Contrary to the statement in the government's Brief in Opposition (pp. 8-9), nothing in the evidence supports the inference that the euphemistically termed "documents"

were prepared for or kept by the petitioner. Nothing supports the inference that he had ultimate dominion over the small group of adding machine tapes. Nothing shows that he had received them "daily". And while all of the tapes carried handwriting, *none of it was claimed to be the petitioner's except as to some figures on one or two pieces which had been torn off the tapes* (and there was no evidence as to when the figures were placed on those pieces). Since there was absolutely no evidence whatsoever to afford an inkling of any connection between the petitioner and a numbers lottery other than the pieces of paper found in the trash, it is pure speculation to conclude that he was the owner merely from the discovery of the pieces of paper in a trash receptacle used by his household, as well as others.

4. With respect to the sentence, it is the position of the petitioner that the effect of the holding below is to afford the executive department a multiple choice of varying penalties for an identical offense. The applicable statute, 26 U. S. C. § 7201 punishes the willful attempt to evade taxes. The evidence in this case did not establish *multiple* attempts.

The government in its Brief in Opposition (p. 9) does not adequately present to this Court the effect of *United States v. Shaffer*, 291 F. 2d 689 (7th Cir. 1961). Contrary to the government's statement, in that case Count I charged a conspiracy to willfully attempt to evade for the months of September through November, 1957; Count II charged willful attempt to evade in the month of September, 1957; Counts III and IV charged willful attempts to evade in November and December, 1957, respectively; and Count V charged willful failure to register. The district court, however, imposed *concurrent sentences of imprisonment* on the first four counts and a consecutive sentence on Count V; and fines on Counts I, II, and V. The problem raised in this case was not raised in the *Shaffer* case. On the other

hand, *Bohn v. United States*, 260 F. 2d 773 (8th Cir. 1959), wherein the indictment charged willful evasion over a period of a year despite the fact that returns were required to be filed monthly, demonstrates that the executive branch of the government does reserve to itself the choice of multiple penalties.

Finally, *United States v. Guterma*, 281 F. 2d 742, 752 (2d Cir. 1960), is inapposite because the separate sentences were imposed under an indictment charging separate substantive offenses of failure to file required reports. The substantive offense charged here was willful attempt to evade. For like reasons *Swepston v. United States*, 289 F. 2d 166, 168-169 (8th Cir. 1961), and *United States v. Alaimo*, 297 F. 2d 604, 605-606 (3d Cir. 1961), cited in the government's Brief in Opposition (p. 19), are inapplicable.

5. Petitioner submits that the issues raised here are of singular importance in the effectuation of constitutional guarantees and in the administration of criminal laws and procedures in the federal courts, and that the decision below is at variance with settled policies and the decisions of this Court and those in other Circuits. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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